RESPONDENTS' REPLY TO PETITIONER'S
SUPPLEMENTAL BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 21,990

TOTAL TELECABLE, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

KVOS TELEVISION CORPORATION,
Intervenor.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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Washington, D. C. 20554

TABLE OF AUTHORITIES

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By Order of June 24, 1968, this Court granted petitioner's request that the parties to this proceeding be permitted to file supplemental briefs in light of the recent Supreme Court decisions in United States v. Southwestern Cable Co., ___ U.S. ___, 36 USLW 4553, and Fortnightly Corporation v. United Artists Television, Inc., ___ U.S. ___, 36 USLW 4656. The Southwestern

decision, upholding the Commission's authority to regulate CATVs, lays to rest petitioner's chief argument on appeal, that the Commission has no jurisdiction over CATVs. In addition, as discussed below, it confirms our argument that the nonduplication rule, as a reasonable regulation under the public interest standard of the Communications Act, does not contravene the First Amendment.

We are of the view that the Fortnightly decision in which the Supreme Court held that CATV systems have no copyright liability has no bearing on this case. Fortnightly changed nothing insofar as the Commission's CATV rules are concerned. It left the CATV systems in the same position with regard to copyright which they had occupied when the Commission's rules were adopted and when this case was briefed and argued. See Second Report and Order, 2 F.C.C. 2d 725, 768-769. Accordingly, we have confined ourselves herein merely to a response to petitioner's supplemental brief.

At the outset, we note that nowhere in petitioner's supplemental brief is the claim made that its case is strengthened in any way by either Southwestern or Fortnightly. On the contrary, petitioner admits that the matter of the Commission's jurisdiction over CATV, which was the subject of Part I of its brief and the major point in its petition for review, has been rendered moot by the Southwestern decision.

At page 6 of its supplemental brief, petitioner argues that "CATV receipt and distribution of broadcast signals is squarely within the First Amendment protection." We respectfully submit that in making this argument, petitioner is merely taking

advantage of its opportunity to have a second bite of the apple. He argued to the same effect in his initial brief at pages 32-36. Our response at pages 43-46 of our brief was to the effect that assuming that the Commission has jurisdiction to regulate CATVs, so long as its rules and regulations are reasonably related to a valid objective, they d o not constitute an infringement upon the rights of free speech of either the CATV system operator or the viewing public. Although Southwestern nowhere dealt with the First Amendment, its affirmance of the Commission's jurisdiction over CATVs validates the presumption upon which the Commission's argument rested. Thus, to the extent that it affects the Constitutional argument at all, Southwestern strengthens the validity of the Commission's position as previously briefed and argued by upholding the key premise of our argument.

Petitioner attempts to tie its case to the Fortnightly decision by referring to the Court's description of CATV service as being more closely related to the viewer's role than to that of the broadcaster. In this event, petitioner argues (Sup. Br. p. 6), the Commission's answer to its First Amendment argument that reasonable regulation of the use of the radio spectrum has been held not to be in violation of free speech,[1/] must fall. We

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1/ NBC v. U.S., 319 U.S. 190 (1943).

note first that Fortnightly's description of CATV service was specifically limited to an interpretation of the word "performance" under the copyright law. Second, petitioner's view of Fortnightly would render meaningless the Commission's jurisdiction over CATVs. Certainly, Fortnightly cannot be read to vitiate the just-released Southwestern decision wherein the Supreme Court stated that the Commission might issue rules and regulations governing CATVs "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (36 USLW, at 4559). Additionally, we note that petitioner's First Amendment arguments that CATVs use no spectrum space and therefore that the rationale of the NBC case is inapplicable (Sup. Br. p. 6), and its attack on the nonduplication rule as prohibited censorship in that it restricts the viewer's choice and the right of the CATV to carry available programs (Sup. Br. pp. 7-9), were previously made by petitioner at pages 34-36 of its original brief, answered by the Commission at pages 43-46 of its brief, and discussed at oral argument. Again, nothing new has been raised.

At pages 10-12 of its supplemental brief, petitioner repeats the assertions in its original brief (at pages 41-47)

that (1) the ordered diminution in service (i.e., no further same-day carriage of duplicated programs) will cause a corresponding decline in subscriptions and threatens the existence of the system, (2) that carriage of the duplicating signals has not and will not cause harm to the economic viability of local television, and (3) that the Commission may not halt its service without first demonstrating in an evidentiary hearing that the premises for the Commission's rules have application to its operation.

In regard to the latter, petitioner renews its Section 312 argument advanced at pages 41 and 50-51 of its original brief. Petitioner now contends that Southwestern supports its position that its situation -- one in which it alleges a curtailment or restriction of existing service by virtue of the requirement to cease same day duplication -- differs from one in which only an extension of service is involved and that only in that instance was the hearing requirement of Section 312 found inapplicable. We respectfully submit that petitioner has misconstrued the Court's 312 discussion. In general, it merely held that Section 312 did not apply for "312(b) provides that a cease-and-desist order may issue only if the respondent 'has violated or failed to observe' a provision of the Communications Act or a rule or regulation promulgated by the Commission under the Act's authority.

Respondents here were not found to have violated or to have failed to observe any such restriction . . .," 36 USLW, at 4560. Thus, the distinction between hearings in regard to existing as opposed to planned operation which petitioner seeks to make was not made by the Supreme Court.

Again, each of these arguments was answered by the Commission in its brief and discussed at oral argument. Additionally, we invite the Court's attention to the fact that decisions reached by other circuits since this case was submitted for this Court's consideration have upheld the reasonableness of the Commission's nonduplication rules in furtherance of the desiderata of the Communications Act. See Wheeling Antenna Company, Inc. v. U.S.A. and F.C.C., ___ F.2d ___ (C.A. 4, decided February 28, 1968), and Conley Electronics Corp. v. U.S.A. and F.C.C.,[2/] ___ F.2d ___ (C.A. 10, decided April 22, 1968), which we submit also lays to rest petitioner's Section 312 argument.

2/ On July 19, 1968, Conley Electronics petitioned for a writ of certiorari.

CONCLUSION

For the above reasons, as well as those already presented to the Court in the original briefing and argument herein, we believe the Commission's orders should be affirmed.

Respectfully submitted,

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July 22, 1968.

CERTIFICATE OF SERVICE

I, Lenore G. Ehrig, hereby certify that the foregoing "Respondents' Reply to Petitioner's Supplemental Brief" was served this 22d day of July, 1968, by mailing true copies thereof, postage prepaid, to the following persons at the addresses shown below:

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